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able,[32] and afford a remedy less troublesome to the court [33] and more satisfactory to the parties [34] than recourse to the Supreme Court.

TAXATION OF THE EXERCISE OF TESTAMENTARY POWERS OF APPOINTMENT. — An increasing amount of litigation is demonstrating the importance of determining when a state may tax the execution of testamentary powers of appointment. According to accepted theories of what constitutes due process, such a tax will be unconstitutional unless the state by its law contributes as a *quid pro quo* some benefit or privilege toward accomplishing the succession.[1] It seems clear that the state wherein the property, either real or personal, is located may always impose such a tax, for its law actually permits the appointee to take. In the case of personalty, wherever it may be, the state of the donor [2] likewise has an unfailing ground for taxation in that its law will determine the validity

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[32] Questions as to expropriation of lands in another state, impossible by ordinary eminent domain proceedings, might be settled by this means. See Charles N. Gregory, "Expropriation by International Arbitration," 21 HARV. L. REV. 23; Carman F. Randolph, *supra*, 2 COL. L. REV. 364, 378. *Cf.* Virginia *v.* Tennessee, 148 U. S. 503, 518 (1893). So as to the question of how much water a state may divert from an interstate river, raised by Kansas *v.* Colorado, 185 U. S. 125 (1902); 206 U. S. 46 (1907). See a similar situation discussed in George B. French and Jeremiah Smith, "Power of a State to Divert an Interstate River," 8 HARV. L. REV. 138.

[33] The Supreme Court urges that interstate compacts be employed as far as possible. See Washington *v.* Oregon, 214 U. S. 205, 217, 218 (1909); Minnesota *v.* Wisconsin, 252 U. S. 273, 283 (1920).

[34] Litigation between states is often protracted, and by a compact the expense and delay of a lawsuit may be avoided, but the difficulty of enforcement still remains. There is no reason to suppose at the present time that a state would be any more ready to heed the terms of its own compact than the decree of the United States Supreme Court.

[1] The general principles governing a state's right to tax, as distinguished from its power to do so, under the 14th Amendment, were well defined by the Supreme Court in Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 202 (1905). *Cf.* Matter of Cummings, 63 N. Y. Misc. 621, 118 N. Y. Supp. 684 (1909); State *v.* Brim., 4 Jones Eq. (N. C.) 300 (1858). See C. E. Carpenter, "Jurisdiction over Debts," 31 HARV. L. REV. 905, 919 *et seq.*

[2] It is well settled that the state of domicil may tax the succession to a resident's foreign personalty. Matter of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893); Frothingham *v.* Shaw, 175 Mass. 59, 55 N. E. 623 (1899). Whether there is actual jurisdiction for such a tax is open to question. See C. E. Carpenter, *supra*, at 921. The fact that the rules of succession furnished by the state of the testator do in reality fix the rights of the beneficiaries may be sufficient. Dammert *v.* Osborn, 141 N. Y. 564, 35 N. E. 1088 (1894). See J. H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 629. If so, then the same reasoning should justify an inheritance tax by the state of the donor, to be collected at the execution of the power by will. But where the state in which chattels subject to appointment are found provides by statute that tangible property of a foreign decedent shall pass according to domestic law, another state could not tax on the basis of residence of the donor. See 1874 ILL. REV. Stat., c. 39, § 1. When the donor is a resident, but the donee and the appointed property both foreign, the state of the donor, though competent to tax the transfer, would not do so under a statute like that of New York, *infra*, n. 9, which includes only such appointments as would be taxable if the property belonged absolutely to the donee. *Cf.* Matter of Fearing, 200 N. Y. 340, 93 N. E. 956 (1911). If, however, any of the property is within the state, the transfer falls to that extent under the statute. Matter of Kissel, 65 Misc. 443, 121 N. Y. Supp. 1088 (1909).

of the exercise of the power.[3] This follows from the common-law theory that the instrument by which the appointor executes the power takes effect not as a distribution of his own property but as a completion of the original settlement [4] under which the appointee is held to take. A third and more difficult situation arises when the state of the donee desires to tax the exercise of the power. If the donor was also a resident, or the property within the state, it can plainly do so, upon the theories already mentioned.[5] If not, may the appointees contend that the transfer is wholly independent of the law of the donee, and that therefore an attempt by his state to tax it would deprive them of property without due process? [6] A recent New York case has so held.[7] Here, the will of the resident donee was not probated at his domicil but only in the state where the property was; this fact, however, should have been immaterial.[8]

There are two lines of reasoning upon which the court might have upheld the New York statute [9] exacting the tax. In the first place, the state of the donee cannot be considered arbitrary or unreasonable in regarding him as possessing important attributes of ownership, as using them to raise up an estate in the beneficiaries,[10] and as thereby

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[3] Harlow *v.* Duryea, 42 R. I. 234, 107 Atl. 98 (1919); Prince de Bearn *v.* Winans, 111 Md. 434, 74 Atl. 626 (1909). See also cases at the end of note 4, *infra*.

[4] Duke of Marlborough *v.* Lord Godolphin, 2 Vesey 61, 77 (1750); Doolittle *v.* Lewis, 7 Johns. Ch. (N. Y.) 45, 48. See LITT., § 169; CO. LITT., 113, a. The classical statement of this rule in the U. S. is by Chancellor Kent in 4 KENT, COMMENTARIES, 338. It has been firmly established by leading cases in various states. Sewall *v.* Wilmer, 132 Mass. 131 (1882); Lane *v.* Lane, 4 Pennewill (Del.) 368, 55 Atl. 184 (1903); Bingham's Appeal, 64 Pa. St. 345 (1870). See 2 SUGDEN, POWERS, 3 ed., 19.

[5] To avoid double taxation, it must at the donor's death have levied only on the immediate estate given to the donee, leaving the possible limitations by appointment to be assessed when they happen. States which tax future interests dependent upon contingencies, at the decedent's death, would tax remainders in default of appointment at the same time as the life estate passing to the donee. New York, however, has construed its statute (1909 N. Y. LAWS, c. 62, § 230; CONSOL. LAWS, c. 60, Art. 10) as not including such remainders if the power is general. Matter of Howe, 86 App. Div. 286, 83 N. Y. Supp. 825, affirmed on opinion below, 176 N. Y. 570, 68 N. E. 1118 (1903). But see Matter of Burgess, 204 N. Y. 265, 97 N. E. 591 (1912). See also 19 HARV. L. REV. 121.

[6] The authorities are conflicting. See, as opposed to such a tax, Walker *v.* Treasurer & Receiver General, 221 Mass. 600, 109 N. E. 647 (1915). *Contra*, State *ex rel.* Smith *v.* Probate Court, 124 Minn. 508, 145 N. W. 390 (1914); Matter of Frazier, 188 N. Y. Supp. 189 (Sur., 1921). This case, and Matter of Seaman, 187 N. Y. Supp. 254 (Sur., 1921) must now be considered overruled in New York by Matter of Canda, *infra*, n. 7, although the latter attempts to distinguish them.

[7] Matter of Canda, 189 N. Y. Supp. 917 (App. Div.) (1921). For the facts of this case, see RECENT CASES, *infra*, p. 348.

[8] See, *infra*, note 19.

[9] See 1909 N. Y. LAWS, c. 62, § 220 (6); CONSOL. LAWS, c. 60, Art. 10. For the New York Law as to powers, see 1909 N. Y. LAWS, c. 52, §§ 130–182; CONSOL. LAWS, c. 50, Art. 5.

[10] Cases such as Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850 (1900), and Emmons *v.* Shaw, 171 Mass. 410, 50 N. E. 1033 (1898), show the rigor with which the common-law theory as stated by Chancellor Kent (see *supra*, note 4) has been applied. Contrast the language of these cases with Matter of Delano, 176 N. Y. 486, 493, 68 N. E. 871, 873 (1903) (affirmed *sub nom.* Chanler *v.* Kelsey, 205 U. S. 466 (1906). See *ibid.*, 474) and with State *ex rel.* Smith *v.* Probate Court, 124 Minn. 508, 511, 145 N. W. 390, 392 (1914). The surprising case of *In re* Pryce, [1911] 2 Ch. 286, in principle, goes further than contended for in the text. An English testatrix, domiciled

subjecting that process to taxation at his domicil just as if he had willed the property as absolute owner. Some of the very cases which established the common-law theory that the conveyance was simply from donor to appointee recognized this theory as a fiction, applied by the law only to reach certain desired results.[11] The increasing number of statutes,[12] purporting to include every testamentary transfer which would have been taxable had the property belonged absolutely to the donee, shows a disposition to override the fiction. This is a tendency which can readily be justified on principle and by analogy. A life-tenant, with a general power to appoint by will, certainly possesses two of the valuable incidents embraced under the compendious term ownership, *viz.:* security in present enjoyment, and the capacity to create by will an absolute estate in any person of his choice — a power upon which he doubtless could realize by contract. Moreover, since the end of the seventeenth century, equity has insisted that upon execution of the power the appointed property becomes assets in the hands of the appointor's executor, available to his creditors.[13] Furthermore, in testing the limitations which he then creates, the Rule against Perpetuities is by some courts applied not from the inception of the power but from the time of its exercise.[14] Notwithstanding these considerations,[15] courts influenced by recent cases of controlling authority which deny that the property passes as part of the personalty of the donee,[16] would prob-

in Holland, exercised by will a testamentary power of appointment over funds in England, the power being derived from an English will. Her surviving parent was held entitled to a *legitime*, by Dutch law, in one eighth of the property, it having become by exercise of the power a part of the estate of the testatrix.

[11] In Bartlett *v.* Ramsden, 1 Keb. 570 (1665), the rule that the appointees were in by the original deed was characterized as only *fictio juris*, "for they were not in *without* the will (*i. e.* of the donee) and therefore that was the principal part of the title." See Duke of Marlborough *v.* Lord Godolphin, *supra*, note 4, at p. 75. See also Hole *v.* Escott, 4 Myl. & Cr. 187, 193 (1838); Rous *v.* Jackson, 29 Ch. Div. 521, 526 (1885); Jackson *v.* Davenport, 20 Johns. (N. Y.) 537, 551 (1822).

[12] See 1917 CAL. STAT., c. 589, § 2 (6); 1911 MINN. LAWS, c. 372, § 1 (5); 1913 GEN. STAT OF MINN., § 2271; 1909 MASS. STAT., c. 527, § 8; 40 STAT. AT L., c. 18, § 402, p. 1097. For the N. Y. statute, see note 9, *supra*.

[13] Thompson *v.* Towne, 2 Vern. 319 (1694); Johnson *v.* Cushing, 15 N. H. 298 (1844); Clapp *v.* Ingraham, 126 Mass. 200 (1879). *Contra*, Balls *v.* Dampman, 69 Md. 390, 16 Atl. 16 (1888). See 2 SUGDEN, POWERS, 6 ed., c. 8, § 3 (7). This general ground was considered insufficient to make the appointed property assets of the donee within the meaning of the inheritance tax of his state, in Commonwealth *v.* Duffield, 12 Pa. St. 277 (1849).

[14] This is the settled rule in England, as to general powers to appoint both by deed or will, and by will only. Rous *v.* Jackson, 29 Ch. Div. 521 (1885); *In re* Flower, 55 L. J. Ch. (N. S.) 200 (1885). But in the United States, the great weight of authority places the *terminus a quo* at the creation of the power, if to appoint by will. Boyd's Estate, 199 Pa. 487, 49 Atl. 297 (1901); Minot *v.* Paine, 230 Mass. 514, 120 N. E. 167 (1918). The authority of Mr. Gray (see GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 526 *et seq.*) has doubtless influenced the American cases. His position has been ably attacked in a classical controversy. See Kales, "General Powers and the Rule against Perpetuities," 26 HARV. L. REV. 64; Thorndike, "General Powers and Perpetuities," 27 HARV. L. REV. 705. See also Foulke, "Powers and Perpetuities," 16 COL. L. REV. 627, 647.

[15] There are other instances in the books where the conveyance is regarded as from the donee. Thus, an appointee may sue the donee on a covenant for quiet enjoyment in the appointing instrument. Hurd *v.* Fletcher, Dougl. 43 (1778). See 2 SUGDEN, POWERS, 3 ed., 19.

[16] O'Grady *v.* Wilmot, [1916] 2 A. C. 231; United States *v.* Field, 41 Sup. Ct. 256

ably hesitate to adopt this argument to sustain the constitutionality of the tax.

A second ground of support was overlooked by the court in failing to draw a distinction between the proper exercise of the power by the *terms* of the appointing instrument — admittedly to be settled by the law of the donor — and the *validity* of that instrument as a will. Before a court having jurisdiction over the property construes the instrument executed by the donee, it must decide whether the writing meets the first essential required by the donor for the exercise of the power, *i. e.*, whether it is in fact the donee's will. Certainly, in the case of personalty,[17] this preliminary question should be determined by reference to the law of the donee's domicil.[18] Unless the donor expressly stipulates otherwise, it cannot reasonably be supposed that he desires formalities different from those required to pass the donee's own personalty. Nor does policy demand a departure from the usual test of validity, the law of the domicil. Nothing could be more inconvenient

(1921). Both, however, are cases of statutory construction. The latter case, arising under 39 STAT. AT L. 756, 777, as amended by 39 STAT. AT L. 1000, 1002, reversed a ruling of the U. S. Treasury Department (1919 REGULATIONS, TREAS. DEPT. 37, Art. 30) to the effect that property passing under the execution of a general testamentary power constituted part of the gross estate of the appointor.

[17] This is the general law with respect to personalty. Cross *v.* U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125 (1892); Jones *v.* Habersham, 107 U. S. 174 (1882). See STORY, CONFLICT OF LAWS, 6 ed., § 380.

[18] It is difficult to determine the precise condition of the law on this point. In England, Tatnall *v.* Hankey, 2 Moore P. C. 342 (1838), simply decided that no court would pass upon the question of the execution of a testamentary power until the Probate Court had admitted the instrument as a will. The case has been widely cited for its *dicta* without noting the significance of its holding. Answering the question left open in Tatnall *v.* Hankey, D'Huart *v.* Harkness, 34 Beav. 324 (1865), which was decided before Lord Kingsdown's Act (24 & 25 Vict., c. 114) took effect, held that a will valid at the foreign domicil of the donee, though not conforming to the law of the donor, was sufficient. It was followed in *In re* Price, [1900] 1 Ch. 442. This sound doctrine cannot be considered as overruled by cases such as *In re* Kirwan's Trusts, 25 Ch. Div. 373 (1883), since these rest upon Lord Kingsdown's Act. Nor by *In re* D'Este's Settlement Trusts, [1903] 1 Ch. 898, nor *In re* Scholefield, [1905] 2 Ch. 408, for the language of the wills there did not amount to an exercise of the power. In Murphy *v.* Deichler, [1909] A. C. 446, the House of Lords decided briefly and without citing authorities that a will invalid at the domicil of the donee, but executed according to English formalities, was a good exercise of an English power of appointment. This would seem to follow a statement of *In re* Price, *supra*, at 452, that the usual test of validity, by the *lex domicilii testatoris* is subject to exception where the will shows on its face that it was made with reference to the law of some other country than that of the testator.

In the United States the most direct decision on testamentary validity as distinguished from specific exercise of the power is a most unfortunate one. Blount *v.* Walker, 28 S. C. 545, 6 S. E. 558 (1888), held that a will, good at the domicil of the donee, was not "duly executed" within the meaning of the donor, unless valid by the law of his state. Part of the property, however, was realty in the state of the donor, and there was a strong dissent. Chief Justice Gray in Sewall *v.* Wilmer, 132 Mass. 131, 135, says, *obiter*, that a will executed according to the requirements of either state should be valid. *Cf.* Ward *v.* Stanard, 82 App. Div. 386, 81 N. Y. Supp. 906 (1903). See also Hollister *v.* Hollister, 85 Oreg. 316, 320, 166 Pac. 940, 941 (1917); Matter of N. Y. Life Ins. & Trust Co., 139 N. Y. Supp. 695, 711 (Sur., 1913).

It has been argued that even on the common-law theory as to the effect of appointment, both the validity of the will and its specific execution of the power should be determined by the law of the donee. See 19 HARV. L. REV. 122. This cannot be sustained on authority.

than to require a testator to ascertain and comply with the varying statutory requirements of every state where personalty subject to his disposal may happen to be.

If in the principal case the state of the donor recognized the appointing instrument as a will because valid as such at the testator's domicil,[19] then the law of the latter did contribute something toward effecting the transfer, and without departing at all from the common-law theory, a tax at the domicil could have been justified.

THE RIGHT *IN REM* IN ADMIRALTY. — Attention has been called recently in *The Pesaro*[1] to the conflict between the American and English views as to the nature of the right *in rem* in admiralty. In our courts, Mr. Justice Story in *The Malek Adhel*,[2] echoing the words of Chief Justice Marshall in an earlier case,[3] unequivocally adopts the doctrine that the action is against the ship itself, not the owner, — the strict *in rem* theory. The language of these cases has been closely adhered to.[4] The English courts have wavered,[5] but now hold that the right against the ship is merely in the nature of a foreign attachment, a proceeding *quasi in rem*.[6]

The theories of both courts find explanation in history. The American doctrine rests on an animistic theory, prevalent in the early stages of legal systems, which endowed an offending instrument with human qualities and fixed the instrument itself with responsibility for the injury.[7] It is not surprising that this doctrine persisted in admiralty, as, popularly, personification applies *par excellence* to a ship.[8] The origin of the English doctrine is more obscure. It probably developed

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[19] It may be fairly inferred from the opinion that if the will of the donee had first been probated in New York, the tax would have been upheld. But this can only be upon the ground that Massachusetts recognizes the instrument as a will because probated at the domicil. Where such probate is lacking, would not Massachusetts, to be consistent, test the *factum* of will by the *lex domicilii*, and thus in either case afford New York a basis for taxation?

[1] Dist. Ct. S. D. N. Y., Oct. 1, 1921. Here it was held that a libel *in rem* could be maintained against a ship in the commercial service of the Italian Government. For the facts of this case see RECENT CASES, *infra*, p. 337.

[2] 2 How. (U. S.) 210, 234 (1844).

[3] The Little Charles, 1 Brock. 347, 354 (1818).

[4] The China, 7 Wall. (U. S.) 53 (1868); The John G. Stevens, 170 U. S. 113 (1897); The Barnstable, 181 U. S. 464 (1901).

[5] See the conflicting decisions of Dr. Lushington in The Ticonderoga, Sw. 215 (1857), and The Druid, 1 W. Rob. 391 (1842).

[6] The Dictator, [1892] P. 304; The Dupleix, [1912] P. 8; The Parlement Belge, 5 P. D. 197 (1879); The Castlegate, [1893] A. C. 38; The Porto Alexandre, [1920] P. 30. See MAYERS, ADMIRALTY LAW AND PRACTICE IN CANADA, pp. 6–23.

[7] See HOLMES, THE COMMON LAW, Chap. I, for a complete exposition of this theory.

[8] Many of the old books express this idea. See 1 BLACK BOOK OF THE ADMIRALTY, 242; Clay *v.* Snelgrave, 1 Ld. Raym. 576 (1700); PARDESSUS, DROIT COMM., n. 961; 3 BLACK, BOOK OF THE ADMIRALTY, 103, 243, 345; Mors *v.* Slew, 3 Keb. 112, 114 (1673).